Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
Qwest Communications International Inc.	)	WC Docket No. 03-260
Petition for Forbearance Under	)	
47 U.S.C. §160(c)	)	

Joint Comments of
Anew Telecommunications Corp. d/b/a
Call America, Peak Communications, Inc., Oregon Telecom Inc.,
United Communications, Inc. d/b/a UNICOM, and
The Utilities Commission of New Smyrna Beach

Anew Telecommunications Corp. d/b/a Call America, Peak Communications, Inc., Oregon Telecom Inc., United Communications, Inc. d/b/a UNICOM, and the Utilities Commission of New Smyrna Beach (the "Joint Commenters"),[1] by their attorney, respectfully submit these Joint Comments in opposition to the Petition for Forbearance of Qwest Communications International Inc., filed December 18, 2003, pursuant to the Commission's *Public Notice* in the above-captioned proceeding.[2]

This petition is nothing more than a "me-too" version of earlier petitions filed by SBC and Verizon,[3] and so little additional comment is necessary to augment the record developed in those proceedings. It demands special note, however, that the core argument of the instant Qwest petition is directly contrary to the black letter of the Telecommunications Act. That

[1] The Joint Commenters consist of small integrated service providers and regional CLECs. All are members of the Save American Free Enterprise in Telecommunications Coalition ("SAFE-T"), which has been created to provide competitive carriers with an economical and effective means to represent their interests in regulatory proceedings in order to ensure the preservation of a competitive marketplace for telecommunications services.
[2] *See Public Notice*, DA 03-4084 (rel. Dec. 23, 2003).
[3] SBC Communications Inc.'s Petition for Forbearance Under 47 U.S.C. §160(c), WC Docket No. 03-235 (filed Nov. 3, 2003); Verizon *ex parte* letter in CC Docket No. 01-338 (filed Oct. 24, 2003). *See* Public Notice, FCC 03-263 (rel. Oct. 27, 2003).

argument, trumpeted in the heading of Section I of the petition and repeated throughout, is that "the establishment of a stand-alone section [sic] unbundling obligation under section 271 (c)(2)(B) is clearly contrary to the purposes and provisions of the Act."[4] But this is *precisely, verbatim* what Section 271 of the Act provides; to wit:

> "(a) GENERAL LIMITATION. – Neither a Bell operating company, nor any affiliate…, may provide interLATA services except as provided in this Section."
>
> * * *
>
> "(c)(2)(B) COMPETITIVE CHECKLIST.—Access or interconnection provided or generally offered by a Bell operating company to other telecommunications carriers meets the requirements of this subparagraph if such access and interconnection includes each of the following:
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> ***
>
> (iv) Local loop transmission…, unbundled from local switching or other services.
>
> (v) Local transport… unbundled from switching or other services.
>
> (vi) Local switching unbundled from transport, local loop transmission or other services.
>
> ***
>
> (x) Nondiscriminatory access to databases and associated signaling….
>
> ***
>
> (d)(4) LIMITATION ON COMMISSION.—The Commission may not, by rule or otherwise, limit or extend the terms used in the competitive checklist set forth in subsection (c)(2)(B).

Accordingly, while Qwest is free to argue, however implausibly, that the Commission may or should forbear from enforcing these sections, it simply cannot say that they are "contrary to the provisions of the Act"—inasmuch as they ARE provisions of the Act.

The balance of Qwest's argumentation is merely repetitive of that of the aforementioned SBC and Verizon petitions. Accordingly, these Joint Commenters hereby attach and

[4] Qwest Petition at 3. *See also id.* at 1 and Argument, Section I (title).

incorporate their December 2, 2003 Comments on the SBC petition.

Respectfully submitted,

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January 20, 2004

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
SBC Communications Inc.'s Petition for	)	WC Docket No. 03-235
Forbearance Under 47 U.S.C. §160(c)	)	

Joint Comments of
Anew Telecommunications Corp. d/b/a
Call America, Peak Communications, Inc., Oregon Telecom Inc.,
United Communications, Inc. d/b/a UNICOM, and
The Utilities Commission of New Smyrna Beach

Anew Telecommunications Corp. d/b/a Call America, Peak Communications, Inc., Oregon Telecom Inc., United Communications, Inc. d/b/a UNICOM, and the Utilities Commission of New Smyrna Beach (the "Joint Commenters"), by their attorney, respectfully submit these Joint Comments in opposition to the Petition for Forbearance of SBC Communications Inc., filed November 6, 2003, pursuant to the Commission's *Public Notice* in the above-captioned proceeding.[5]

The Joint Commenters consist of small integrated service providers and regional CLECs. All are members of the Save American Free Enterprise in Telecommunications Coalition ("SAFE-T"), which has been created to provide competitive local exchange carriers ("CLECs") with an economical and effective means to represent their interests in regulatory proceedings where the continued availability of basic rights and access to critical resources in the possession of incumbent local exchange carriers ("ILECs") granted them under the Telecommunications Act of 1996 ("the 1996 Act" or "Telecom Act") (47 U.S.C. §§ 151 *et seq*.) is in question.

[5] *See Public Notice*, DA 03-3608 (rel. Nov. 10, 2003).

I. THE SAME REQUEST FOR FORBEARANCE HAS ALREADY BEEN DENIED BY THE COMMISSION

As a threshold matter, it should be noted that the instant SBC Petition is merely a repackaging of the July 2002 Verizon petition in CC Docket 01-338, which sought precisely the same relief.[6] When the Commission's recent *Triennial Review Order* explicitly held that Section 271(c)(2)(B) of the Telecommunications Act establishes an "independent and ongoing" obligation "for BOCs to provide access to loops, switching, transport, and signaling regardless of any unbundling analysis under Section 251,"[7] Verizon sought to salvage its petition by narrowing its requested forbearance relief to "broadband elements."[8] The Commission responded by "deny[ing] Verizon's initial Petition because the principal argument for the relief initially requested was rendered moot by the *Triennial Review Order*," treated Verizon's *ex parte* letter as a new forbearance petition limited to such "broadband" relief, and invited comment on that "new" petition.[9] SBC, evidently dissatisfied with Verizon's narrowing of its original petition, comes now seeking exactly the relief that Verizon sought and later abandoned – and that the Commission has now expressly denied.

Further, by its own implicit admission, the instant SBC petition is essentially a "me-too" version of BellSouth's pending petition for reconsideration of the aforementioned holding of the *Triennial Review Order*.[10]

Thus, this SBC petition should be recognized at the outset as suffering from the fatal double-whammy of being not only an untimely petition for reconsideration of the *Triennial*

[6] Petition for Forbearance of the Verizon Telephone Companies, CC Docket No. 01-338 (filed July 29, 2002).
[7] Report and Order and Further Notice of Proposed Rulemaking in CC Docket Nos. 01-338, 96-98 and 98-147, FCC 03-36 (rel. Aug. 21, 2003) ("*Triennial Review Order"*), at ¶¶ 653-54.
[8] Verizon *ex parte* letter in CC Docket No. 01-338 (filed Oct. 24, 2003).
[9] Public Notice, FCC 03-263 (rel. Oct. 27, 2003) at 2. Because the "new" Verizon petition still requests essentially the same relief as SBC does in the instant proceeding, albeit limited to broadband functionalities of UNEs, these Joint Commenters respectfully request that the Commission summarily deny the "new" Verizon petition as well as this SBC Petition.
[10] *See* SBC Petition at 1-2.

Review Order but, more importantly, a petition for relief that has been denied by this Commission scarcely a month ago, having been "rendered moot" by that Order, in which the Commission sought comment on, carefully weighed, and expressly rejected the exact arguments on which both the old Verizon petition and this new SBC petition are grounded.[11] This defect is clearly fatal to SBC's petition.

II. THE TELECOMMUNICATIONS ACT PROHIBITS THE RELIEF SOUGHT BY SBC

A. The Commission Has Held Correctly that the Requirements of Section 271(c)(2)(B) are Completely Independent of Section 251

In light of the Commission's very recent holding on this subject in the *Triennial Review Order*, very little needs to be added in these Comments. Indeed, the Commission's conclusion was inescapable: no other interpretation is possible under the plain language of the Telecom Act. The Act, quite straightforwardly:

(1) Provides in Section 251(c)(3) that every *ILEC* must provide nondiscriminatory access to such unbundled network elements --

  (a) that the Commission determines should be made available under the section's "necessary" and "impair" standards (47 U.S.C. § 251(d)(2)); and

  (b) at cost-based rates (47 U.S.C. § 252 (d)(1)) (which the Commission implemented by adopting the "TELRIC" pricing methodology adopted in its Local Competition Order);[12] **and**

(2) Provides *separately* in the "competitive checklist" of Section 271(c)(2)(B) that *BOCs* may provide in-region interLATA services only if they offer competitors, among other things --

  (a) nondiscriminatory access to unbundled network elements pursuant to the above-described provisions (and limitations) of Section 251(c)(3) (47 U.S.C. §271(c)(2)(B)(ii)) *and*, among other specific items --

[11] *See Triennial Review Order* at ¶¶ 649-667.
[12] First Report and Order in CC Docket Nos. 96-98 and 95-185, 11 FCC Rcd 15499 (1996).

(b) access to unbundled local loops (47 U.S.C. §271(c)(2)(B)(iv)), local transport (47 U.S.C. § 271(c)(2)(B)(v)), local switching (47 U.S.C. § 271(c)(2)(B)(vi)), and signaling (47 U.S.C. § 271(c)(2)(B)(x)).

The SBC petition essentially asks the FCC to regard these very specific provisions of Sections 251 and 271 as identical and fungible – thus its prayer that the Commission forbear from enforcing the latter if it "de-lists" any or all such network elements pursuant to the "impairment" analysis mandated in the former. But, as the Commission correctly held in the *Triennial Review Order*, these obligations are separate and independent. In fact, they are that and much more—they are distinct in each of these critical ways:

(1) Section 251(c) applies to all ILECs, while Section 271(c) applies only to BOCs;

(2) Section 251 lists no specific network elements, but rather leaves that task to the Commission, while Section 271(c)(2)(B) *specifically* requires the provision of, *inter alia*, local loops, transport, switching, and signaling;

(3) Section 251(c) requires only the provision of those UNEs that the Commission finds to be mandated under the "necessary" and "impair" standards of that section, while Section 271(c)(2)(B) requires the provision of the aforementioned UNEs *without any such limiting standards*;

(4) The UNEs to be provided by ILECs under Section 251(c)(3) must be provided at the forward-looking rates mandated under Section 252(d), while those listed in Section 271(c)(2)(B) are not necessarily subject to that pricing methodology;

(5) The requirements of Section 251(c)(3) and 252(d)(1) are expressly incorporated as checklist items in Section 271(c)(2)(B)(ii) (referred to by the Commission as "checklist item 2"),[13] while unbundled loops, transport, switching, and signaling are listed *separately and independently* as checklist items 4, 5, 6 and 10 (47 U.S.C. § 271(c)(2)(B)(iv), (v), (vi), (x)); and

(6) The access and interconnection provisions of Section 251(c) are "duties" required of all ILECs irrespective of other considerations, while the checklist items in Section 271(c)(2)(B) must be implemented only if a BOC wishes to provide in-region interLATA services in a state.

Thus, far from being limited by or redundant of the provisions of Section 251(c), the unbundling obligations of Section 271(c)(2)(B) are utterly distinct in purpose, scope, and

[13] *See Triennial Review Order* at ¶ 651 and n.1974.

applicability. Indeed, it is impossible to fairly conclude, as the SBC Petition urges, that Congress intended them to be interrelated. If Congress so intended, it would have so indicated; but SBC's assertions notwithstanding, "[t]he short answer is that Congress did not write the statute that way."[14] Instead, by incorporating the Section 251(c)(3) provisions as checklist item 2 and independently including unbundled loops, transport, switching and signaling as items 4, 5, 6 and 10, it indicated precisely the opposite. Accordingly, the house of cards on which SBC's petition stands topples: Section 271 has no nexus whatsoever to the "necessary and impair" analysis upon which Section 251(c) hinges and upon the *USTA* decision focused,[15] and the result of such analysis has no bearing on the ongoing requirements of Section 271.

B. The Commission May Not Forbear From Enforcing the Section 271 Checklist Requirements at This Time

In the *Triennial Review Order*, the Commission correctly decided that the unbundling provisions of Section 271(c)(2)(B) are ongoing requirements that BOCs must continue to meet if they provide in-region interLATA services. But even if the Commission wished to decide otherwise, it could not. In unusually direct and emphatic terms, Congress in the Telecom Act has admonished the Commission not to modify or limit the specific requirements of the Section 271 checklist. Section 271(d)(4) of the Act states with blunt clarity:

> LIMITATION ON COMMISSION. – The Commission may not, by rule *or otherwise*, limit or extend the terms used in the competitive checklist set forth in subsection (c)(2)(B).[16]

Thus, Congress made unerringly clear that BOCs must comply with and the Commission must enforce the Section 271(c)(2)(B) checklist "as is," without either extending it or limiting it.

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[14] *Russello v. United States*, 464 U.S. 16, 23 (1983).
[15] *See United States Telecom Ass'n v. FCC,* 290 F.3d 415 (D.C. Cir. 2002).
[16] 47 U.S.C. § 271(d)(4) (emphasis added).

SBC contends, however, that once a BOC has obtained Section 271 authority to provide in-region interLATA service in a state, the checklist requirements essentially become a nullity—or at least become ripe for forbearance. In so arguing, SBC evidently hopes hat the Commission will not examine Section 271 closely. First, the opening and bedrock command of Section 271 states plainly: "(a) GENERAL LIMITATION. – Neither a Bell operating company, nor any affiliate…, may provide interLATA services except as provided in this Section."[17] It does not say "until," or "as provided in subsections x, y and z;" it expressly conditions BOC in-region interLATA service provision on continuing compliance with the entirety of Section 271, including the "specific interconnection requirements"[18] in the Section 271(c)(2)(B) checklist. Equally explicitly, Section 271(d)(6) provides that "if at any time *after the approval* of an [interLATA entry] application…, the Commission determines that a [BOC] has *ceased to meet* any of the conditions required for such approval," the Commission may impose penalties up to and including revocation of the interLATA operating authority.[19] Thus, the Act makes absolutely clear that the requirements of Section 271 do not end with a grant of interLATA authority, but rather are continuing and ongoing.

In sum, a reading of Section 271 as a whole makes plain that BOCs must comply with the pro-competitive requirements of that section as a condition of being an interLATA provider, not merely of becoming one. As the Commission observed in the *Triennial Review Order*, the dual purpose of Section 271 is both to preserve interexchange competition and to foster local competition[20] – objectives that obviously do not reach fruition upon a BOC's initiation of interLATA services. Indeed, it is nonsensical to believe that Congress could have intended that

[17] 47 U.S.C. § 271(a).
[18] 47 U.S.C. § 271(c)(2).
[19] 47 U.S.C. § 271(d)(6)(A).
[20] *See Triennial Review Order* at ¶ 655.

BOCs should open their local monopolies to competition until they enter the interLATA market, but then may slam the door the moment they achieve such entry.

Yet greater statutory reinforcement of the importance of the ongoing requirements of Section 271 – and specifically of Congress' intent that the forbearance provision of Section 10 should not be available to undermine those requirements – is found in Section 10 itself:

> (d) LIMITATION. – . . .[T]he Commission may not forbear from applying the requirements of Section 251(c) or 271…until it determines that those requirements have been fully implemented.[21]

SBC asks the Commission to find that "fully implemented" refers only to a grant of interLATA authority under Section 271. Again, SBC hopes that the Commission will ignore or overlook the whole of both Section 10(d) and Section 271 – thus its non-sequitur that "the obligations of the Competitive Checklist have been fully implemented once Section 271 *has been granted*."[22] Happily, the Commission has not "granted" Section 271 to SBC. The limitation on forbearance applies to "the requirements of … Section 271," not to merely the subsections dealing with the interLATA entry approval process. And, as shown above, Section 271 contemplates ongoing requirements, including the "anti-backsliding" provisions of subsection 271(d)(6).

It is impossible to fairly interpret Section 10(d) to hold that the Commission might forbear from applying specific checklist requirements of Section 271 – by finding that they have been "fully implemented" – when to do so would effectively "de-implement" them. The only logical statutory construction is that the provisions of Section 271 are fully implemented, and so arguably subject to forbearance, when their purpose is accomplished. In the context of the competitive checklist, that purpose is the emergence of viable local competition – not for a

[21] 47 U.S.C. § 160(d).
[22] SBC Petition at 8.

moment in time, only to be extinguished by the withdrawal of the checklist items, but rather when that competition is broadly established, and the BOC no longer commands market power. It is nonsense to urge that Congress intended that the competition it sought to enable through the Section 271(c)(2)(B) competitive checklist, the subsection (d)(4) proscription on limiting that checklist, and the Section 10(d) restriction on Section 271 forbearance, should be only *momentary* competition.

C. The Forbearance Criteria of Section 10 Clearly Preclude the Relief Sought by SBC

In addition to the express prohibition of Section 10(d), the demanding standards for forbearance prescribed under Sections 10(a) and (b) clearly preclude the relief sought by the SBC.

1. *Section 10(a)(1): "enforcement of such … provision is not necessary to ensure that the charges, practices … are just and reasonable and are not unjustly or unreasonably discriminatory."*

As interpreted by the Commission in the *Triennial Review Order*, the subject provisions of the Section 271 competitive checklist simply require the offering unbundled loops, transport, switching and signaling on a nondiscriminatory basis and at just and reasonable rates pursuant to Sections 201 and 202 of the Act. Forbearance from these requirements, however, would mean that these checklist items would not be made available *at all.* In light of the above demonstration that these provisions of Section 271 are ongoing requirements intended to remain in place at least until the purposes of the Section – effective competition in the local as well as the interexchange marketplace – are fulfilled, it cannot be (and is not) seriously contended that enforcement of the checklist has become unnecessary to ensure just, reasonable and nondiscriminatory treatment of CLEC competitors.

2. *Section 10(a)(2): "enforcement . . . is not necessary for the protection of consumers."*

Again, SBC does not even try to satisfy this prong of the forbearance test, relying instead on the illusory connection between Section 251 – which is subject to and limited by the "impair" standard – and Section 271, which is not. Consumers are benefiting today from the increasing choice of local exchange providers that the Act's pro-competitive provisions have wrought. There are greater choices in terms of prices, terms and conditions. This is precisely what the 1996 Act sought. Granting SBC's petition would curtail those benefits to consumers by depriving them of these choices. SBC does not claim otherwise.

3. *Section 10(a)(3): "forbearance … is consistent with the public interest."*

For all of the reasons discussed above, there is no basis for the Commission to now terminate these competition-enabling provisions of the 1996 Act. The Act was passed to foster the development of meaningful local exchange competition. The actions requested would be diametrically opposed to accomplishing that purpose. Doing so would not be in the public interest. Again, by placing virtually total reliance on its fatally flawed "251/impairment/*USTA"* analysis, SBC's public interest claim fails.

4. *Section 10(b): "COMPETITIVE EFFECT TO BE WEIGHED. -- . . .The Commission shall consider whether forbearance … will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services . . . ."*

In light of the foregoing, it is impossible to conclude that grant of this forbearance at this time will affirmatively promote and enhance competition. There is a huge gulf between an alleged absence of "impairment" under Section 251 – now defined by the Commission as "pos[ing] a *barrier or barriers to entry* . . . likely to make entry into a market *uneconomic"*[23] –

[23] *Triennial Review Order* at ¶ 84.

and a claim that *denial* of access to important tools of competition is pro-competitive or in the public interest. If such were the case, Congress would never have had to include the Section 271 checklist, or indeed to write the Act at all.

III. CONCLUSION

SBC simply has not made a case for forbearance. In light of the foregoing, its petition should be summarily denied.

Respectfully submitted,

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